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DOING BUSINESS UNDER THE AGREEMENT ON GOVERNMENT PROCUREMENT: THE TELECOMMUNICATIONS BUSINESS— A CASE IN POINT

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INTRODUCTION

On July 26, 1979, President Carter signed into law the Trade Agreements Act of 1979¹ (the Act) which approves and implements the several trade agreements negotiated during the Tokyo Round of Multilateral Trade Negotiations (Tokyo Round).² The Tokyo Round³ was the seventh in a series of multinational trade negotiations⁴ conducted under the auspices of the General Agreement on Tariffs and Trade (GATT).⁵ Unlike the previous rounds of the

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¹ Act of July 26, 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (to be codified in scattered sections of 19 U.S.C.).

² *Id.*, § 2 (to be codified in 19 U.S.C. § 2503); see Hederman, *Revised U.S. Trade Laws and How They Can Affect Your Clients*, in *DOING BUSINESS AFTER THE MULTILATERAL TRADE NEGOTIATIONS* 3 (1979).

³ Although the Tokyo Round negotiations were actually conducted in Geneva, the discussions were labelled the "Tokyo Round" because they were opened by the Declaration of Ministers meeting at Tokyo in September of 1973. See General Agreement on Tariffs and Trade: Tokyo Declaration on Multilateral Trade Negotiations, GATT Press Rel. GATT/1134 (Sept. 14, 1973), reprinted in 12 INT'L LEGAL MATERIALS 1533 (1973) [hereinafter cited as Tokyo Declaration].

⁴ Previous rounds of GATT negotiations were held in: Geneva, Switzerland, 1947; Annecy, France, 1949; Torquay, England, 1951; Geneva, Switzerland, 1955-1956; Geneva, Switzerland, 1960-1962; Geneva, Switzerland, 1964-1967. K. DAM, *THE GATT — LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 56 (1976).

⁵ The General Agreement on Tariffs and Trade, opened for signature Oct. 22, 1947, 61 Stat. 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT], sought to raise standards of living, assure full employment, increase the growth of real income and effective demand, and to expand the production of goods. These objectives were to be achieved through "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT, *supra*, preamble. See Graham, *Revolution in*

GATT negotiations,⁶ the Tokyo Round was aimed at reducing and eliminating nontariff barriers⁷ to international trade.⁸ One of the major nontariff barriers which has hindered the integration of world trade and the fostering of political and economic cooperation among nations has been discrimination against foreign products and suppliers by government procuring entities.⁹ While such discrimination was not prohibited in the original GATT treaty,¹⁰ the Tokyo Round negotiators took a significant step toward eliminating discriminatory government purchasing by approving the Agreement on Government Procurement (the Agreement).¹¹ Designed to afford foreign products and suppliers "treatment no less favorable than that accorded to domestic products and suppliers,"¹² the Agreement is likely to produce the dual effect of expanding United States exports while increasing the risks of injury to domestic business created by aggressive foreign suppliers who previously could not compete.¹³

With a focus on the telecommunications industry, this Article will call attention to some of the factors that should be considered by management and its attorneys in planning to do business under the Agreement. To this end, the Article will review the major provisions of the Agreement¹⁴ and its implementing legislation — title

Trade Politics, 36 FOREIGN POL'Y 49, 52 (1979); 20 HARV. INT'L L.J. 695, 696 (1979).

⁶ Article XXV of the General Agreement provides the basis for the negotiations held subsequent to the original agreement: "Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement." GATT, *supra* note 5, art. XXV; see note 5 *supra*.

⁷ Nontariff trade barriers encompass a variety of trade distorting devices including: subsidies, quotas, border taxes, discriminatory government procurement, custom valuation procedures, and other means to encourage exports or discourage imports. See S. REP. NO. 1298, 93d Cong., 2d Sess. 74, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7224; Katz, *Economics: Major Elements of the Multilateral Trade Negotiations*, 79 DEP'T OF STATE BULL. 27, 27 (1979).

⁸ See Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153, 156 (1979); 20 HARV. INT'L L.J. 695, 697 (1979). For background in the events and circumstances which led to the Tokyo Round negotiations, see S. REP. NO. 249, 96th Cong., 1st Sess. 1-6, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 387-92.

⁹ See notes 22-24 and accompanying text *infra*.

¹⁰ See GATT, *supra* note 5, art. III, para. 5.

¹¹ GATT Doc. MTN/NTM/W/211/Rev. 2 (1979) [hereinafter cited as Agreement on Government Procurement].

¹² *Id.*, art. II.

¹³ Under one projection, approximately \$25 billion in foreign government purchases will be opened to bidding by businesses within the United States. Katz, *supra* note 7, at 28.

¹⁴ See notes 27-57 and accompanying text *infra*.

III of the Trade Agreements Act of 1979.¹⁵ This will be followed by a brief outline of the telecommunications market and a discussion of the political and economic environment in which it presently operates.¹⁶ Since it is that environment upon which the Agreement and the Act will impact, the Article will conclude with some projections of what effects the future environment will have on the telecommunications industry.

THE AGREEMENT ON GOVERNMENT PROCUREMENT

Background

The seventh round of Multilateral Trade Negotiations sponsored by the parties to GATT opened in 1973 with the "Tokyo Declaration"¹⁷ wherein nearly one hundred foreign ministers declared their intention to reduce or harmonize nontariff as well as tariff barriers to international trade.¹⁸ Although the Trade Act of 1974¹⁹ codified the process for the United States' participation in those negotiations and outlined our negotiation objectives,²⁰ that legislation was silent on barriers to government procurement.²¹

Discrimination in government procurement was not, however, a new problem in international trade. In fact, many governments traditionally had encouraged public spending on domestic rather than foreign products.²² Consequently, article III of the GATT exempted government purchasing from the prohibitions against discriminatory treatment of foreign goods.²³ Despite the continuing

¹⁵ Trade Agreements Act of 1979, §§ 301-309, Pub. L. No. 96-39, 93 Stat. 144, 236-42 (codified in 19 U.S.C. §§ 2511-2518 (Supp. III 1979)). See notes 58-67 and accompanying text *infra*.

¹⁶ See notes 68-114 and accompanying text *infra*.

¹⁷ See Tokyo Declaration, *supra* note 3.

¹⁸ See generally Graham, *supra* note 8, at 155-59. The ministers expressly affirmed that the negotiation should aim, *inter alia*, to "reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline." Tokyo Declaration, *supra* note 3, para. 3(b).

¹⁹ 19 U.S.C. §§ 2101-2487 (1976).

²⁰ See S. REP. No. 1298, 93d Cong., 2d Sess. 1, 14-15, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7196-97.

²¹ Concern for the problems resulting from discriminatory government procurement was expressed in the legislative history to the Trade Act. See S. REP. No. 1298, 93d Cong., 2d Sess. 83, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7233.

²² See generally R. BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE 59-70 (1970).

²³ GATT, *supra* note 5, art. III, para. 8(a) (as amended by the Protocol Modifying Part

nature of this problem, the elimination of discrimination by governments in their nondefense procurements has been the subject of serious discussions by the United States and other developed Western countries since the conclusion of the preceding round of Multilateral Trade Negotiations.²⁴ With this concern in mind, the Tokyo Round negotiators were successful in initiating a package of trade agreements²⁵ which included the Agreement on Government Procurement.²⁶

Scope of the Agreement

The purpose of the Agreement on Government Procurement is straightforward. Each signatory party must accord the products and suppliers of each other party "treatment no less favorable" than that accorded to its own or any other party's products and suppliers.²⁷ The Agreement applies to purchases by all government entities and agencies under the direct or substantial control of a signatory party, but its coverage is limited, for a three year trial period, to those entities which have been volunteered by the parties.²⁸ Moreover, the Agreement applies only to procurement con-

II and Article XXVI of the General Agreement on Tariffs and Trade, Sept. 14, 1948, 62 Stat. 3679, T.I.A.S. No. 1890, 62 U.N.T.S. 80). Although article III specifically requires a signatory party to accord imported products "treatment no less favorable" than that accorded domestic products, GATT, *supra* note 5, art. III, para. 4, an exception to this "national treatment" requirement provides:

The provisions of this article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

Id., art. III, para. 8(a).

²⁴ See generally Pomeranz, *Toward a New International Order in Government Procurement*, 11 LAW & POL'Y INT'L BUS. 1263, 1270-79 (1979). See also Gantt & Speck, *Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order*, 7 J. PUB. L. 378 (1958).

²⁵ The "package" of agreements included one tariff and eleven nontariff agreements. Graham, *supra* note 8, at 159. In addition to covering discriminatory procurement, the nontariff agreements covered, *inter alia*, import licensing procedures, subsidies and countervailing duties, technical barriers to trade, and customs valuations practices. See Statement by GATT Director-General Oliver Long, GATT Press Rel. No. 1234 (April 12, 1979), reprinted in INT'L LEGAL MATERIALS 553, 554 (1979). See generally Graham, *supra* note 8.

²⁶ Agreement on Government Procurement, *supra* note 11.

²⁷ *Id.*, art. II.

²⁸ *Id.*, arts. I, para. 1 & III, paras. 5, 13. Those activities volunteered for coverage by the signatory countries are listed in annex I to the Agreement. Although the term "entity" is not defined, the Agreement notes that it is understood to include agencies. *Id.*, art. I para. 1(a) n.1. Thus, the term encompasses government subdivisions, agencies, and instrumentalities substantially controlled by the government. Anthony & Hagerty, *Cautious Optimism as a*

tracts having a minimum value of 150,000 special drawing rights,²⁹ or approximately \$190,000. While it covers products and services incident to the supply of products, it does not cover service contracts per se.³⁰

The Agreement's scope is further limited by provisions that exempt certain purchases of a covered entity.³¹ For example, a party may take any action to procure war material, or other indispensable material for national security or defense. Similarly, nothing in the Agreement prevents any party from imposing measures necessary to protect life, health, or intellectual property.³² Finally, purchases by regional and local governments are not covered by the Agreement, although the parties have agreed to inform their local governments about the benefits of liberalization of government procurement.³³

Guide to Foreign Government Procurement, 11 LAW & POL'Y INT'L BUS. 1301, 1302 n.10 (1979). The United States originally wished to have the agreement apply to "all entities under the direct or substantial control of governments," *id.* at 1311 n.52, but settled for entity-by-entity negotiations directed toward balancing the "relative value of export opportunities," *id.* at 1310-11. See also S. REP. NO. 249, 96th Cong., 1st Sess. 129, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 515. For example, the European Economic Community refused to include as covered entities those governmental agencies which purchase heavy electrical and transportation equipment. Anthony & Hagerty, *supra*, at 1311. In fact, the European Economic Community continues to have trouble opening up these markets even as to its own members. *Id.* To balance these exclusions, the United States has withheld coverage of the following entities: the Department of Transportation; the Department of Energy; the Bureau of Reclamation; the Army Corps of Engineers; the Tennessee Valley Authority; the Postal Service; COMSAT; and CONRAIL. S. REP. NO. 249, 96th Cong., 1st Sess. 129-30, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 515-16. While Canada similarly excluded such entities as its Department of Communications, Department of Transportation, and Fisheries and Marine Service, new opportunities were opened to businesses within the United States when Canada volunteered for exclusion its Department of Energy, Mines and Natural Resources, and its Department of Industry, Trade and Commerce. See *id.* at 145, reprinted in, [1979] U.S. CODE CONG. & AD. NEWS at 531.

²⁹ Agreement on Government Procurement, *supra* note 11, art. I, para. 1(b). Special Drawing Rights, or "SDR's" are the reserve unit of account for the International Monetary Fund. A minimum value-threshold for coverage apparently was set to avoid inconveniences to governmental agencies in applying the Agreement's provisions to small contracts. See Anthony & Hagerty, *supra* note 28 at 1321. The Agreement does encourage the parties, however, to conduct their purchasing on small contracts as if the Agreement were applicable. Agreement on Government Procurement, *supra* note 11, art. I, para. 1(b) n.2.

³⁰ Agreement on Government Procurement, *supra* note 11, art. I, para. 1(a). The Agreement does provide for renewed negotiations within three years of its implementation at which time the possibilities of including service contracts within the Agreement's coverage may be explored. *Id.*, art. IX, para. 6(b). See Anthony & Hagerty, *supra* note 28, at 1319-21; Pomeranz, *supra* note 24, at 1288-89.

³¹ Agreement on Government Procurement, *supra* note 11, art. VIII.

³² *Id.*; see Anthony & Hagerty, *supra* note 28, at 1322-23.

³³ Agreement on Government Procurement, *supra* note 11, art. I, para. 2.

Obligations Under The Agreement

1. Technical Specifications

In general, the Agreement places two categories of obligations on parties with respect to their procurement process. The first of these requires that technical specifications shall not be prescribed or applied to create obstacles to international trade.³⁴ Specifically, technical specifications must "be in terms of performance rather than design" and must "be based on international standards, national technical regulations" or, where appropriate, recognizable national standards.³⁵ In addition, a product must not be described by a particular trade name or producer unless there is no other intelligible way of describing its requirements and unless words such as "or equivalent" are included in the description.³⁶

2. Tendering Procedures

The second, more encompassing set of obligations relates to bidding, or tendering procedures.³⁷ Perhaps the most progressive

³⁴ *Id.*, art. IV, para. 1. Proper government procurement contract bidding commences with a well-formulated description of the work to be performed. 1 R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 224 (3d ed. 1977). The description, spelling out the obligations of the contractor, is usually set forth in drawings, technical documents, and product descriptions; it is commonly known as the specifications. *Id.* Since the formal advertising and bidding process provides little opportunity for clarification, specifications must be drafted with accuracy, precision, and clarity. *Id.* See generally *National Presto Indus., Inc. v. United States*, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).

In the United States, if specifications are so restrictive as to preclude open competition, the Comptroller General may require cancellation of the contract. See *Comp. Gen. Dec. No. B-162059*, 12 Gov't CONTR. REP. (CCH) ¶ 81,315 (1967). Cf. 48 *Comp. Gen.* 345, 349 (1968) (performance of contract permitted despite restrictive specifications). Specifications are overly restrictive if they exceed the minimum needs of the procuring entity. See *Comp. Gen. Dec. No. B-178603*, 19 Gov't CONTR. REP. (CCH) ¶ 82,597 (1973).

³⁵ Agreement on Government Procurement, *supra* note 11, art. IV, para. 2.

³⁶ *Id.*, art. IV para. 3. Prior to the agreement and its prohibition on the use of trade names, it had been observed that those who purchased equipment tended to favor "one make or model over another." 1B J. McBRIDE & I. WACHTEL, *GOVERNMENT CONTRACTS* § 10,180 at 10-517 (1980); R. NASH & J. CIBINIC, *supra* note 34, at 237 n.2. Under current United States procurement practices, advertisement on a "brand name or equal basis" is proper when insufficient data is available to formulate a description. *Comp. Gen. Dec. No. B-161786*, 12 Gov't CONTR. REP. (CCH) ¶ 81,314 (1967). If reference to a trade name is necessary, it is to be construed as establishing a standard of quality, rather than limiting competition. See *Sherwin v. United States*, 436 F.2d 992, 1000 (Ct. Cl. 1971). Specifications which do not designate a product by its brand name, but which describe the product of a particular manufacturer in detail, should include the "or equal" phrase. 39 *Comp. Gen.* 101, 108 (1959).

³⁷ Agreement on Government Procurement, *supra* note 11, art. V. A typical component

measures in the Agreement, the tendering procedures require public visibility throughout the procurement process. These transparency provisions are intended to promote the purposes of the Agreement by insuring the application of fair and nondiscriminatory treatment in purchasing. For example, each party must not only publish any law, regulation, judicial decision, or administrative ruling of general application regarding government procurement,³⁸ but also must be able to explain its procurement practices and procedures to any inquiring party.³⁹

of the preferred treatment received by domestic suppliers is the absence of a requirement that bid invitations be extended to foreign firms. J. EVANS, *THE KENNEDY ROUND IN AMERICAN TRADE POLICY* 105 (1971). It has been noted that although the Buy-American Act, 41 U.S.C. §§ 10a-10d (1976), requires such preferences, other countries which in fact follow similar procurement practices do so without publishing explicit standards. J. EVANS, *supra*, at 105-06.

³⁸ Agreement on Government Procurement, *supra* note 11, art. VI, para. 1. While discrimination in government procurement has been overt in the United States, *see* note 37, *supra*, "discriminatory measures are tacit in other countries, but they are often present in the form of administrative practices." W. CLINE, N. KAWANABE, T. KRONSTJO & T. WILLIAMS, *TRADE NEGOTIATIONS IN THE TOKYO ROUND* 190 (1978).

³⁹ Agreement on Government Procurement, *supra* note 11, art. VI, para. 1. Prior to the Agreement, various United States entities encountered difficulties obtaining information necessary for them to compete in the foreign market. Anthony & Hagarty, *supra* note 28, at 1323. Great Britain, France, Germany, and Japan, for example, openly advertised only a minimal number of their contracts. *Id.* Article VI additionally stipulates that any entity so requested must provide suppliers with information as to why it is not qualified to be included on a supplier's list, or was not invited to submit a bid on a particular contract. Agreement on Government Procurement, *supra* note 11, art. VI, para. 2. Throughout the negotiations, the United States sought a guarantee that the name of the winning bidder, as well as the amount of the award, would be published after issuance of the procurement contract. Pomeranz, *supra* note 24, at 1285. A compromise was reached whereby unsuccessful tenderers are to be notified either in writing or by publication within seven working days after the award. Upon request bidders will be informed why their tenders were not selected, given information about the winning bid and the name of the winning bidder. *Id.*

Solicitation in the United States is implemented through an Invitation For Bids (IFB). 1 R. NASH & J. CIBINIC, *supra* note 34, at 244. Armed Services and Federal Procurement Regulations require that bids be solicited from all qualified supply sources. 32 C.F.R. § 2-102.1(a) (1979); 41 C.F.R. § 1-2.102(a) (1979). Therefore, the IFB must be mailed to a number of prospective bidders sufficient to insure adequate competition. 32 C.F.R. § 2-203.1 (1979); 41 C.F.R. § 1-2.203-1 (1979). A procuring agency obtains names through a special search for a specific procurement or through an appropriate Bidders Mailing List which it maintains. *See* 32 C.F.R. § 2-205 (1979); 41 C.F.R. § 1-2.205 (1979). *See also* R. NASH & J. CIBINIC, *supra* note 34, at 245. The IFB is required to be displayed at the place of contracting, 32 C.F.R. § 1-1002-2 (1979), and the procuring agency must publish a summary of its needs in the *Commerce Business Daily*, issued by the Department of Commerce. 32 C.F.R. § 1-1003.1 (1979); 41 C.F.R. § 1-1.1003-1 (1979). The agency is further required to retain a reasonable number of copies of the IFB in the contracting office and provide them to others having a legitimate interest in the procurement. 32 C.F.R. § 2-203.1 (1979); 41 C.F.R. § 1-2.203-1 (1979). The IFB spells out the "ground rules of the competition," includ-

Restrictions also have been placed on the permissibility of the various methods of tendering and, therefore, should guarantee greater visibility and fairness. Specifically, the Agreement provides for three distinct types of tendering—open, selective, and single tendering.⁴⁰ Since the procuring entity contacts suppliers individually under single tendering, this tendering procedure is permissible only in limited instances.⁴¹ Under open tendering procedures, however, all interested suppliers are allowed to submit a tender.⁴² Similarly, under selective tendering procedures, all suppliers invited to submit bids may do so.⁴³ Consequently, open and selective tendering may be used interchangeably provided notice of each proposed offering is published, and sufficient tenders are invited to insure

ing the "bid opening time" and place and whatever information bidders have to supply. 1 R. NASH & J. CIBINIC, *supra* note 34, at 245. It further contains the specifications to be used or incorporates them by reference, and includes "the terms and conditions of the proposed contract." *Id.* These procedures encourage a maximum of potential bidders and an increase in competition. *Id.* at 245-46.

⁴⁰ Agreement on Government Procurement, *supra* note 11, art. V, para. 1; see Note, *Technical Analysis of the Government Procurement Agreement*, 11 LAW & POL'Y INT'L BUS. 1345, 1350-53 (1979); Note, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement*, 12 N.Y.U.J. INT'L LAW & POL. 315, 335-37 (1979). The effectiveness of these tendering procedures has been questioned, since signatory countries need only demonstrate a good faith effort to comply. See Anthony & Hagerty, *supra* note 28 at 1328. For a brief overview of tender methods used in the United States, see 1 R. NASH & J. CIBINIC, *supra* note 34, at 245.

⁴¹ Agreement on Government Procurement, *supra* note 11, art. V, para. 15. Instances where single tendering is appropriate include unsatisfactory responses to open or selective tenders, limited availability of a product due to its unique nature, urgency, and the need to replace parts from a particular supplier. *Id.* See generally IV W. SURREY & D. WALLACE, INTERNATIONAL BUSINESS TRANSACTIONS § IV-1.4(a) (1980). In the United States, for example, statutory authority permits contracting without advertising in limited instances — such as where the consideration does not exceed \$10,000 — when public exigency is present, or if there is a single supply source. 41 U.S.C. § 5 (1976). A public exigency is "a sudden and unexpected happening, an unforeseen occurrence or condition, a perplexing contingency or complication of circumstances, or a sudden or unexpected occasion for action." 38 Comp. Gen. 171, 173 (1958).

⁴² Agreement on Government Procurement, *supra* note 11, art. V, para. 1. Since an invitation to the "general public" is inherent in an open tender, it is the least restrictive method of government procurement. "Unfortunately for world trade, the selective and single tender systems are more prevalently used for government procurements." Allison, *The Nontariff Trade Barrier Challenge: Development and Distortion in the Age of Independence*, 12 TULSA L.J. 1, 13-14 (1976).

⁴³ Entities which employ selective tendering may maintain permanent lists of qualified suppliers. Agreement on Government Procurement, *supra* note 11, art. V, para. 6. The Agreement prescribes safeguards, such as the publication of conditions for inscription on a list, to insure that this method is not used to preclude competition. *Id.* Tenders must be invited "from the maximum number of domestic and foreign suppliers, consistent with efficient operation of the procurement system." *Id.*, para. 5.

maximum international competition.⁴⁴

Regardless of the tendering procedure employed, the procurement entity may not discriminate against or among foreign suppliers in the process of qualifying them to participate in the tendering process.⁴⁵ More particularly, any condition for establishing the financial or technical capability of a supplier must be nondiscriminatory.⁴⁶ Finally, all interested suppliers must be given whatever information is necessary to permit them to submit responsive and timely tenders.⁴⁷

Additional transparency requirements built into the Agreement assure the regularity of tender openings and awards. For example, bid openings must be in the presence of tenderers, their representatives, or impartial witnesses.⁴⁸ Moreover, the procuring entity must award the contract to the tenderer submitting the lowest bid or the bid determined under prior published criteria to be the most advantageous, provided of course, that such party is fully capable of performance.⁴⁹ An unsuccessful tenderer must be informed that a contract has been awarded, and upon request, the procurement entity must provide him with the reasons why it was not selected, including information on the characteristics and relative advantages of the tender selected,⁵⁰ and the name of the win-

⁴⁴ Agreement on Government Procurement, *supra* note 11, art. V, para. 2.

⁴⁵ Discriminatory tendering practices assume a variety of forms. Purchases may be made from foreign firms, for example, only if products are unavailable from domestic producers. GENERAL ACCOUNTING OFFICE, GOVERNMENTAL BUY-NATIONAL PRACTICES OF THE UNITED STATES AND OTHER COUNTRIES — AN ASSESSMENT 41-42 (1976). Another method is the imposition of artificial product standards. *Id.* at 44-45. See generally Note, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Governmental Procurement*, 12 N.Y.U.J. INT'L LAW & POL. 315, 325-33 (1979).

⁴⁶ Agreement on Government Procurement, *supra* note 11, art. V, para. 2(b).

⁴⁷ *Id.*, para. 2(a).

⁴⁸ *Id.*, para. 14(d). This section seeks to implement a consistent procedure to be followed at bid openings. See Anthony & Hagerty, *supra* note 28, at 1326-27.

⁴⁹ Agreement on Government Procurement, *supra* note 11, art. V, para. 14(f). By statute, in the United States, an "[a]ward shall be made . . . to that responsible bidder whose bid conforming to the invitation for bids, will be considered most advantageous to the government, price and other factors considered . . ." 41 U.S.C. § 253(b) (1976). Factors to be evaluated other than price include foreseeable costs and delays, changes requested by the bidder, and the feasibility of making more than one award. 41 C.F.R. § 1-2.407-5 (1979). It appears settled, however, that the principle factor is price. See 37 Comp. Gen. 51 (1957).

⁵⁰ Agreement on Government Procurement, *supra* note 11, art. VI, para. 4. Information as to why a particular tender was selected may be useful to an unsuccessful bidder. It is suggested, however, that some degree of discrimination in the procurement process is inevitable.

ning tenderer.⁵¹ Finally, procedures must be established to hear and review complaints arising out of any phase of the procurement process.⁵²

Enforcement of Provisions

A self-policing mechanism is provided to enforce the Agreement's provisions.⁵³ Thus, if a signatory party believes that an objective of the Agreement is impaired by another party, and its grievance cannot be resolved upon consultation with that party,⁵⁴ then the standing Committee on Government Procurement, established under article VII of the Agreement, will meet to investigate the grievance and try to resolve the problem.⁵⁵ If unsuccessful, either party may request the Committee to form a panel to investigate the issues further, and attempt to reconcile the dispute.⁵⁶ If the panel is likewise unsuccessful, the Committee will make final recommendations to the parties. If those recommendations are not accepted, the Committee may authorize a party to suspend, in whole or in part, the application of the Agreement to any other party for an appropriate time.⁵⁷

⁵¹ *Id.*

⁵² *Id.*, para. 5. It has been observed that the "first stage in any dispute resolution under the Code is consultation." Anthony & Hagerty, *supra* note 28, at 1329.

⁵³ Agreement on Government Procurement, *supra* note 11, art. VII. Recently, GATT provisions for the settlement of disputes have become increasingly ineffective. Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153, 171 (1979). See generally I W. SURREY & D. WALLACE, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS § I-2.3(b) (2d ed. 1980).

⁵⁴ Agreement on Government Procurement, *supra* note 11, art. VII, para. 4.

⁵⁵ The Agreement provides for the establishment of a Committee on Government Procurement, composed of representatives of the Parties to the Agreement, *id.*, para. 1, which is to monitor transactions pursuant to the Agreement. See Note, *Technical Analysis of the Government Procurement*, 11 LAW & POL'Y IN INT'L BUS. 1345, 1355 (1979).

⁵⁶ Agreement on Government Procurement, *supra* note 11, art. VII, para. 9. Each panel may operate in any manner it deems appropriate. *Id.*

⁵⁷ *Id.*, para. 14. The enforcement mechanism must deal with two distinct situations: a good faith disagreement concerning a party's obligations, and a purposeful disregard of the agreement. Anthony & Hagerty, *supra* note 28, at 1328. While self-policing provisions may adequately settle disputes in the first instance, they will be clearly insufficient in the latter. It has been observed that "compliance with the Code is always purely voluntary, notwithstanding a signatory's agreement to comply." *Id.* Suspension of the Agreement to a party should only be authorized by the Committee if "circumstances are serious enough to justify such action." Agreement on Government Procurement, *supra* note 11, art. VII, para. 14.

TRADE AGREEMENTS ACT OF 1979

The Agreement on Government Procurement, as well as the other agreements reached by the representatives to the Tokyo Round of Multilateral Trade Negotiations, could not have become enforceable with respect to the United States without congressional approval.⁵⁸ Such approval came with the Trade Agreements Act of 1979, which authorized the President to accept for the United States the final texts of the Tokyo Round agreements initiated by the negotiators in Geneva on April 12, 1979.⁵⁹

Although the Trade Agreements Act implements in excess of a dozen trade agreements, the implementation of the Agreement on Government Procurement is contained exclusively within title III of the Trade Agreements Act.⁶⁰ The major thrust of title III is that it allows the President to waive any law, regulation, or procedure which, if applied to products or suppliers covered by the Agreement, would result in discriminatory government procurement.⁶¹ The President's waiver authority, however, is not unlimited. Such waiver may be made only with respect to the eligible products or suppliers of those foreign countries or instrumentalities which the President has determined fall within one of the following four categories: The country is a party to the Agreement and provides "appropriate reciprocal competitive government procurement opportu-

⁵⁸ The Constitution expressly grants the power "[t]o regulate commerce with foreign nations" to Congress. U.S. CONST. art. I, § 8, cl. 3. Congress may, however, delegate a substantial portion of this authority to the President. *California Bankers Ass'n. v. Schultz*, 416 U.S. 21, 59 (1974). The Trade Act of 1974, 19 U.S.C. § 2101 (1976), granted the President the authority over a 5-year period to enter into trade agreements, but provided that Congressional approval was necessary before such agreements would be given effect. *Id.* at § 2112; see S. REP. NO. 1298, 93d Cong., 2d Sess. 1, 21-22, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7201.

⁵⁹ S. REP. NO. 249, 96th Cong., 1st Sess. 31-32, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 417-18; see Act of July 26, 1979, Pub. L. No. 96-39, § 2, 93 Stat. 144 (1979) (to be codified in 19 U.S.C. § 2503).

⁶⁰ See Trade Agreements Act of 1979, 19 U.S.C. §§ 2511-2518 (Supp. III 1979); S. REP. NO. 249, 96th Cong., 1st Sess. 1, 128, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 514.

⁶¹ Elimination of discriminatory government procurement procedures was a principle objective of the United States during the Tokyo Round. See S. REP. NO. 249, 96th Cong., 1st Sess. 128, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 318, 514. The Buy-American Act is an example of such discrimination. See 41 U.S.C. § 10a-10d (1976). S. REP. NO. 249, 96th Cong., 1st Sess. 22, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 408. The Trade Agreements Act of 1979 allows the President to waive Buy-American Act restrictions and other obstacles which discriminate against designated foreign suppliers. See 20 HARV. INT'L L.J. 687, 691 (1979).

nities to United States products and suppliers;" the country is not a major industrial country and, although not a party to the Agreement, will abide by the provisions of the Agreement with respect to the United States and grant such reciprocal opportunities to United States products; the country is not a major industrial country, is not a party to the Agreement, and does not have the ability to comply with the procedural obligations of the Agreement relating to the procurement process, but will grant reciprocal opportunities to United States products and suppliers on a bilateral basis; or the country is a least developed country.⁶²

The benefits which should accrue from nondiscriminatory government purchasing cannot be realized, however, unless several nations agree to abide by the provisions of the Agreement on Government Procurement. In recognition of this fact, Congress has incorporated within the Trade Agreements Act two mechanisms which insure not only compliance with the Agreement by signatory nations, but also act to encourage nonsignatories to become parties to the Agreement. The first of these operates by authorizing the President to modify or withdraw a waiver or designation of eligibility previously granted by him.⁶³ The second and more effective lever designed to assure reciprocity in government procurement requires the President to prohibit purchases by government entities of products of a foreign country which have not been designated as eligible for a waiver by the time the first waiver is granted under the Act.⁶⁴ The impact of this provision is somewhat lessened, however, since the President may delay a prohibition for up to two

⁶² 19 U.S.C. § 2511 (Supp. III 1979). The act defines a "least developed country" as a country so designated by the United Nations General Assembly. *See id.*, § 2518. Major industrial countries include "Canada, the European Economic Community, the individual member countries of such Community, Japan, and any other foreign country designated by the President." 19 U.S.C. § 2136(d) (1976). This definition is derived from a subsection of the Trade Act of 1974 and is incorporated by reference in the Trade Agreements Act of 1979. *See* 19 U.S.C. § 2518 (Supp. III 1979).

⁶³ 19 U.S.C. § 2511 (Supp. III 1979). This provision was designed to enable the President to accommodate necessary changes as a result of dispute settlements or expansion of the scope of the Agreement. S. REP. NO. 249, 96th Cong., 1st Sess. 133, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 381, 519. The President's authority to modify waivers and delegations is limited, and, in some instances, consultation with Congress is necessary. *See* 19 U.S.C. § 2514 (Supp. III 1979).

⁶⁴ *See* 19 U.S.C. § 2512 (Supp. III 1979). For the first 3 years of the Agreement, parties to the agreement may exclude any agencies from coverage. *See* 20 HARV. INT'L L.J. 695, 699 (1979). Such exclusions may have the effect of banning United States suppliers from certain bids, while foreign suppliers may still bid for domestic procurements. S. REP. NO. 249, 96th Cong., 1st Sess. 135, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 381, 521.

years in the case of all but major industrial countries.⁶⁵ The President may also authorize agency heads, in general, and the Secretary of Defense, in particular, to waive a prohibition on a case-by-case basis when it is in the national interest, or when a country enters into a reciprocal procurement agreement with the Department of Defense.⁶⁶ The Act does, however, authorize the President to do what he deems necessary to induce others to become parties to the Agreement or to give appropriate reciprocity to the United States.⁶⁷

THE TELECOMMUNICATIONS BUSINESS

While the objectives of the Agreement on Government Procurement are obviously desirable, it may have deleterious effects on the telecommunications industry within the United States. To understand the problems which may arise requires an overview of the telecommunications market as it presently operates. Basically, that market can be divided into two major segments. The first is comprised of sales to commercial or nondefense customers including governments and private parties.⁶⁸ The second is comprised of sales to governmental customers who purchase for national defense purposes.

The Nondefense Market

The global telecommunications market consists of products used for transmitting, switching, and receiving voice and data communications for commercial and consumer purposes.⁶⁹ Worldwide,

⁶⁵ 19 U.S.C. § 2512 (Supp. III 1979). Section 2512 addresses an outright prohibition against the procurement of products from nondesignated countries, while section 2511 deals with waiving restrictions for designated countries. *Compare id.* § 2511 *with id.* § 2512.

⁶⁶ *Id.* § 2512.

⁶⁷ *Id.* § 2511(a)(2). See S. REP. NO. 249, 96th Cong., 1st Sess. 134, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 520.

⁶⁸ The segment of the industry whose sales are to commercial and nondefense customers will be referred to as the "nondefense market."

⁶⁹ Transmission products include microwave, radio, cable, and multiplex equipment. See Millar, *Data-Transmission Equipment*, in COMMUNICATION SYSTEM ENGINEERING HANDBOOK ch. 12 (D. Hamsher ed. 1967). Switching products encompass the large electromechanical, electronic, or digital switchboards used in telephone company central offices, the smaller private automatic branch exchanges (PABX's), as well as desk-top apparatus. See Schneider, *Switching Engineering of Switched Systems*, in COMMUNICATION SYSTEM ENGINEERING HANDBOOK ch. 7 (D. Hamsher ed. 1967). Receiving, or subscriber, products include both the telephone instrument itself and ancillary equipment used in the home and office. Burkhard & Clare, *User Equipment and Services*, in COMMUNICATION SYSTEM ENGINEERING HANDBOOK,

the industry has annual sales of approximately \$40 billion,⁷⁰ with a little less than one-half of the purchases occurring in the United States and the remainder divided approximately equally between Europe and the rest of the world.⁷¹

In the United States, the major customers for telecommunications products are the privately owned telephone operating companies, such as those in the Bell and General Telephone systems.⁷² A

2-53 to 2-66 (D. Hamsher ed. 1967).

⁷⁰ I ARTHUR D. LITTLE, INC., WORLD TELECOMMUNICATIONS, OVERVIEW AND TECHNOLOGICAL TRENDS 49 (1980) [hereinafter cited as ADL]. Estimates of industry sales range up to \$60 billion. *E.g.*, ARNOLD BERNHARD & CO., THE VALUE LINE INVESTMENT SURVEY 749 (5th ed. 1980). Revenue is generated from two types of sources. Data communication networks comprise approximately \$5 billion of total sales, but telephone use represents the principal revenue source. STANDARD & POOR'S TELECOMMUNICATIONS INDUSTRY SURVEY T9 (Jan. 17, 1980). *See generally* U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK ch. 34 (1978).

⁷¹ The United States is expected to retain its position as the "largest market in the world" for the purchase of telecommunications equipment during the next decade. 1 ADL, *supra* note 70, at 49. In 1980, the United States will sell a total of \$16.9 billion worth of telecommunications equipment. *Id.* In 1985, the annual sales total is expected to be in the area of \$24.8 billion. *Id.* By 1990, the projected sales of United States telecommunications equipment are expected to reach \$35.5 billion annually. *Id.* Despite the increase in sales that is expected for the United States telecommunications industry over the next ten years, its share of the total telecommunications market worldwide is expected to drop from its current 42.3% to 40.6% by 1990. *Id.* By contrast, the Asian telecommunications market is the most rapidly growing market in the world today and, consequently, is expected to replace Europe as the "second largest regional market" during the 1980's. *Id.* Presently, Western European countries account for the largest "aggregate share" of the region's market with total sales expected to reach \$16.3 billion by 1990. *Id.* The remaining regions in the world market, Latin America, Oceania, and Africa, aggregately represent 5% to 6% of the world market. *Id.* at 49. These smaller regional markets are attractive to the rest of the world, despite their size, because they have remained uncommitted to one particular source for their supply of telecommunications equipment. *Id.* at 49-50.

⁷² The largest domestic telecommunications company in the United States is American Telephone & Telegraph Co. (AT&T). Its subsidiaries include Western Electric Co., Inc. (Western Electric) and Bell Telephone Laboratories, Inc. (Bell Labs), as well as over twenty local telephone companies. Western Electric manufactures and services equipment for the Bell System, accounting for approximately 80% of United States equipment purchases in 1980. Bell Labs, responsible for research and development in the Bell System, is owned by AT&T and Western Electric. MOODY'S INVESTORS SERVICE, INC., MOODY'S PUBLIC UTILITY MANUAL 108-09 (1979); 2 ADL, *supra* note 70, at 97. General Telephone & Electronics Corp. (GTE), the principal competitor of AT&T, is a holding company which controls telephone and manufacturing enterprises. MOODY'S INVESTORS SERVICE, INC., *supra*, at 806.

Domestic competition, fostered by judicial and administrative action, *see, e.g.*, Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956); *In re Carterfone*, 13 F.C.C.2d 420, 13 Rad. Reg. (P-H) 2d 597, *aff'd mem.*, 14 F.C.C.2d 571, 14 Rad. Reg. (P-H) 2d 185 (1968), is expected to continue to dilute the market dominance thus far enjoyed by AT&T in the telecommunications equipment market. ARNOLD BERNHARD & CO., THE VALUE LINE INVESTMENT SURVEY 749 (5th ed. 1980). *See generally* STANDARD & POOR'S TELECOMMUNICATIONS INDUSTRY SURVEY T3-T21 (1980).

relatively new source of activity, however, has come from the Interconnect companies. These companies provide private telephone equipment and service in competition with the telephone companies, usually in commercial settings, and are becoming increasingly large suppliers.⁷³ In Europe, Latin America, the Mid-East, the Far-East, and Africa, transmission, switching, and subscriber equipment is purchased principally by the postal, telegraph, and telephone administrations or corporations (PTT's).⁷⁴ The PTT's are either owned or substantially controlled by government entities and their primary function is to maintain and operate the telephone systems.⁷⁵

The Defense Market

The United States defense telecommunications business comprises only a small part of the multi-billion dollar defense electronics industry.⁷⁶ Driven by high technology and backed by large expenditures in research and development, the equipment used in defense telecommunications is generally the same type as that found in the nondefense sector.⁷⁷ Since its use, however, is primarily for command, control, and communications for national defense, it has historically been of greater reliability than equipment utilized for nondefense purposes. Recently, however, the acceptable level of technology in the defense business has become more

⁷³ Equipment which can be connected into AT&T's central switching apparatus is now provided by private firms to end-users. GENERAL ACCOUNTING OFFICE, UNITED STATES-JAPAN TRADE: ISSUES AND PROBLEMS 61 (1979) (Report of the Comptroller General to the Joint Economic Committee) [hereinafter cited as Comptroller General Report]. The genesis of this activity was the 1968 FCC decision, *In re Carterfone*, 13 F.C.C.2d 420, 13 Rad. Reg. (P-H) 2d 597, *aff'd mem.*, 14 F.C.C.2d 571, 14 Rad. Reg. (P-H) 2d 185 (1968), which legalized interconnection. A registration program adopted by the FCC in 1975 permits terminal equipment to be interconnected with the Bell System without negotiation between the competing supplier and AT&T. MOODY'S INVESTORS SERVICE, INC., MOODY'S PUBLIC UTILITY MANUAL 110 (1979). Private buyers who acquire equipment through interconnect companies will represent approximately 21% of the telephone equipment purchasers in 1980. 2 ADL, *supra* note 70, at 97.

⁷⁴ See generally UNITED NATIONS STATISTICAL YEARBOOK 627-30 (1978).

⁷⁵ See Comptroller General Report, *supra* note 73, at 63. National PTT's in Europe also have varying standardized designs for telephone systems in different countries. *Id.* A natural result of the varying designs of European telephone systems is that "regulations on technology, design and size for other types of telephone equipment vary from country to country." *Id.*

⁷⁶ See STANDARD & POOR'S ELECTRONICS—ELECTRICAL INDUSTRY SURVEY E31 (1979).

⁷⁷ See 1981 *Department of Defense Appropriations Hearings, Subcommittee of the Committee on Appropriations*, 96th Cong., 2d Sess., part 7 at 395 (1980).

common in the commercial business. The convergence of these technologies has resulted in the increasing adaptation of standard commercial equipment to military needs. This pattern appears to be similar to that experienced in the rest of the world.⁷⁸

The Pre-Agreement Sales Environment

1. The Environment in the Nondefense Market

Since 1933, the United States, under the Buy-American Act,⁷⁹ has with limited exceptions⁸⁰ required government agencies to discriminate in their purchase of products for public purposes in favor of domestic products. This preference generally has included a six percent price preference for United States products over foreign products, and a twelve percent preference if the United States seller is a small business or labor surplus area concern.⁸¹ Many states have enacted Buy-American-type preferences as well. Although most foreign countries do not practice discrimination under an express statute such as the Buy-American Act,⁸² they neverthe-

⁷⁸ See notes 144-49 *infra*.

⁷⁹ Ch. 212, tit. III, §§ 1-3, 47 Stat. 1520 (1933) (current version at 41 U.S.C. §§ 10a-10d (1976)). The Buy-American Act deals with purchases of materials by the federal government for "public use." 41 U.S.C. § 10a (1976). Severe unemployment during the depression acted as an impetus for this legislation, which was designed to protect vulnerable domestic industries from foreign competition. See Note, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement*, 12 N.Y.U.J. INT'L L. & POL. 315, 319-20 (1979). For a discussion of the Buy-American Act's legislative history, see Gantt & Speck, *Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order*, 7 J. PUB. L. 378, 378-82 (1958).

⁸⁰ The provisions of the Act are inapplicable to articles, materials, or supplies to be used outside of the United States or if articles, materials, or supplies are not produced "in sufficient and reasonably available commercial quantities and of a satisfactory quality." 41 U.S.C. § 10a (1976).

⁸¹ Exec. Order No. 10,582, 3 C.F.R. 230 (1954-1958 Compilation). Price preferences for domestic products have continued to be the subject of political controversy. The original Act of 1933 was the direct result of the massive unemployment gripping the country during the Great Depression. See Trainor, *Buy American Act: Examination, Analysis and Comparison*, 64 MIL. L. REV. 101 (1974).

⁸² See GENERAL ACCOUNTING OFFICE, GOVERNMENTAL BUY NATIONAL PRACTICES OF THE UNITED STATES AND OTHER COUNTRIES—AN ASSESSMENT 7-8, 39 (1976) [hereinafter cited as GAO Report]. Nontariff barriers are often justified by political considerations, such as a desire to provide jobs for the unemployed, or a desire to protect vulnerable industries from foreign competition. See Note, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement On Government Procurement*, 12 N.Y.U.J. INT'L L. & POL. 315, 324 (1979). Supporters of trade-restrictive policies for national security items argue that in the event of a crisis, the American national security demands a healthy domestic industry so that needed products would not have to come from foreign sources. *Id.* at 325.

less have favored domestic over foreign products through a body of administrative practices and other nontariff barriers. These more subtle nontariff barriers include a reluctance by purchasing agents to involve themselves in the intricacies of foreign sourcing, and patriotic notions that it is best to look solely to domestic sources.⁸³ Of greater significance to the telecommunications industry is that most foreign countries have adopted either the international telephone system standard (CCITT)⁸⁴ or have developed their own unique standard for telecommunications equipment. In the United States, however, the substantially different Bell standard is used.⁸⁵

An obvious example of procurement discrimination is the European Economic Community's internal directive that purchases from outside the European Community (EC) may be made by members only if the product is not available from other EC member states.⁸⁶ Postal, telegraph, and telephone administrations, however, are excluded from the scope of the internal directive.⁸⁷ Purchases of telecommunication equipment by the PTT's of the individual members, however, are governed by their own more restrictive procurement requirements.⁸⁸ Since the EC members have withheld telecommunication purchases by the PTT's from the coverage of the Agreement on Government Procurement, a substantial disadvantage to United States exporters of telecommunications equipment remains unrectified. Moreover, European telephone-operating companies either hold an ownership stake in local suppliers or maintain well-established relationships with them.⁸⁹ Domestic procurement policies are not, however, the only barriers which inhibit the flow of telecommunications products between the United

⁸³ See note 82 *supra*.

⁸⁴ The International Telegraph and Telephone Consultative Committee (CCITT) is a major consulting department of the International Telecommunication Union (ITU), an organization through which governmental telecommunications administrations may reach agreement on technical standards. 1 ADL, *supra* note 70, at 35.

⁸⁵ See Comp. Gen. at 63.

⁸⁶ See GAO Report, *supra* note 82, at 40-49.

⁸⁷ *Id.*

⁸⁸ *Id.* In August 1980, the EEC Commission urged the European Council to require that member state PTT's procure at least 10% of their telecommunications needs from other member states in order to further the standardization of equipment within Europe and to facilitate new services. In addition, the Council was urged to require members to open to other member states all PTT purchases of telephone interconnect equipment, starting in 1981. 26 ELECTRONIC NEWS 1302 (Aug. 18, 1980, at 19, col. 1).

⁸⁹ 1 ADL, *supra* note 70, at 23.

States and the EC.⁹⁰ A significant additional obstacle has been the imposition of technical specifications and maintenance requirements which favor local suppliers.⁹¹ While all of these barriers have, to some extent, induced United States firms to open foreign subsidiaries in European markets, those subsidiaries are frequently not viewed in the same benign manner as domestic firms.⁹²

Trade patterns similar to those of the United States and Europe are apparent among other nations. In Mideastern and African countries which are currently developing telecommunications systems, for example, industry growth has occurred largely through public tenders of sizeable contracts to prequalified suppliers.⁹³ A local manufacturing presence is frequently required to become a prequalified, long-term supplier.⁹⁴ Moreover, to the extent that foreign purchasing does exist, it is somewhat restricted by the strong technical and economic ties between many developing countries and former colonial powers.⁹⁵ Similarly, telecommunications purchases in countries of the Far East are usually directly or indirectly controlled by the government.⁹⁶ Japan, in order to insulate its home market from competition, has essentially embargoed sales of major categories of United States telecommunications products.⁹⁷ Additionally, while Taiwan and Korea use equipment built to the United States standard, both often require local manufacturing investment and national participation in the business.⁹⁸

In the more developed countries of Central and Latin America, such as Brazil and Mexico, there is a desire and capability to control the domestic telecommunications technology. Control is often accomplished through a requirement of local manufacture or assembly, and a plan for increasing local material and labor content. Furthermore, in those countries which are now developing

⁹⁰ *Id.* at 28.

⁹¹ See generally D. McLACHLIN & D. SWANN, *COMPETITION POLICY IN THE EUROPEAN COMMUNITY* 61 (1967).

⁹² Representatives of U.S. foreign subsidiaries have expressed a concern over "a shrinking government market because of the increasing competitiveness of domestic corporations." See GAO Report, *supra* note 82, at 39.

⁹³ See 1 ADL, *supra* note 70, at 20.

⁹⁴ See *id.* at 21.

⁹⁵ In the so-called "Francophone countries," for example, substantial reliance placed on French suppliers is due, in part, to past relationships with France. *Id.*, at 8.

⁹⁶ For a brief description of the "Buy National" policy in Taiwan, see 4 ADL, *supra* note 70, at 253.

⁹⁷ See note 110 *infra*; GAO Report *supra* note 82, at 49-52.

⁹⁸ See 4 ADL, *supra* note 70, at 202.

their telecommunications systems, the purchasing decision may be subject to factors other than supply and demand. A government controlled PTT may well be motivated by the need to control inflation, to support a fledgling industry, to adjust the balance of payments, or to support local employment.

2. The Sales Environment in the Defense Market

The United States, like most nations, has preferred to satisfy its defense telecommunications needs from domestic suppliers. For example, the Department of Defense (DOD), under its program for Industrial Preparedness Planning, purchases communications equipment almost exclusively from domestic firms.⁹⁹ Moreover, the DOD has given a 50% price preference to domestic products since 1959, thereby adjusting the United States balance of payments.¹⁰⁰

Conflicting factors will undoubtedly continue to influence international sales of defense telecommunications equipment. North Atlantic Treaty Organization allies have expressed their need for a fair share of defense procurement for economic and national security reasons, and for increasing their research and development capability.¹⁰¹ Perhaps there exists a growing feeling in some foreign quarters that the United States should not be the world's arsenal and that defense supply responsibilities should be shared among the countries subject to mutual defense pacts. The DOD, for its part, is looking with greater frequency to foreign sources for more advantageous prices.¹⁰² These conflicting concerns increasingly are being addressed, independent of the Agreement, through memo-

⁹⁹ GAO Report, *supra* note 82, at 13. See Note, *Eliminating Nontariff Barriers to International Trade - The MTN Agreement on Government Procurement*, 12 N.Y.U.J. INT'L L. & POL. 315, 325 (1979).

¹⁰⁰ 32 C.F.R. § 6-104.4(b) (1979). The fifty percent price preference, also known as the "fifty percent test," Watkins, *Effects of the Buy American Act on Federal Procurement*, 31 FED. BAR J. 191, 198 (1972) is straightforward. For purposes of the Buy-American Act, a product is considered foreign if "the foreign components" of the good or product "aggregate fifty percent or more of the total component cost of that material." *Id.* This requirement has been strictly applied. *Id.*

¹⁰¹ GAO Report, *supra* note 82, at 13. For an insight into the views of several allies on the matter of defense cooperation in NATO, see "Proceedings of the Seminar on U.S. Defense Cooperation with Belgium, Denmark, The Netherlands, Norway, Portugal," Washington, D.C., January, 1980.

¹⁰² In *Watkins-Johnson Company*, No. B-195805, 29 BCA ¶ 85,633 (1980) the Comptroller General recently upheld an Air Force award to a British firm, stating: "We do not find an intent to maintain current domestic sources of supply, but rather an intent to increase the amount of defense equipment furnished by non-domestic sources." *Id.*

randa of understanding¹⁰³ between the Department of Defense and its foreign government counterparts. There are three types of procurement-oriented memoranda presently in effect: (1) restricted purchase offset arrangements; (2) unrestricted purchase offset arrangements; and (3) reciprocal procurement arrangements. Each anticipates the waiver of Buy-American and balance of payment price equalization requirements for some amount of United States purchases of foreign products. Under both types of offset memoranda, a foreign country agrees to purchase a particular defense product. The United States, in turn, commits the domestic industry primarily benefiting from the foreign purchase, to provide offset sale opportunities to the foreign country's industry.¹⁰⁴ The amount of the offset commitment is based upon a fixed percentage of the purchase by the foreign country.¹⁰⁵ The distinction between restricted and unrestricted offset arrangements lies in the availability of the exemption from the Buy-American Act, balance of payments price differential requirements, and import duties on the offset purchases. In the case of unrestricted offsets, all offset purchases made to fill the requirements of American defense agencies may be exempted, while for restricted offsets to be eligible for an exemption, the offset purchase must be in support of the defense product purchased by the foreign country.¹⁰⁶ Under both types of offset arrangements, however, waivers are made on a case-by-case basis. Reciprocal procurement agreements are intended to remove barriers — such as customs duties and buy-national re-

¹⁰³ The United States is party to reciprocal procurement agreements with France, May 22, 1978, U.S. DEPARTMENT OF STATE, TREATIES IN FORCE 78 (1980), Italy, September 11, 1978, *id.* at 108, the Netherlands, August 24, 1978, *id.* at 148, Norway, May 19, 1979, *id.* at 157, West Germany, October 17, 1978, *id.* at 72, Portugal, May 28, 1979, T.I.A.S. No. 9433, the United Kingdom, September 24, 1975, T.I.A.S. No. 9033.

¹⁰⁴ If the industry fails to honor the reciprocal commitments of a memorandum, the DOD may itself fulfill the obligation. *Hearings on H.R. 11607 Before the Committee on Armed Services, Special Subcommittee on NATO Standardization, Interoperability, and Readiness*, 95th Cong., 2d Sess. 981-98 (1978) (statement of Walter R. Edgington). See *id.* at 643-47 (statement of Richard C. Bowman).

¹⁰⁵ Under the United States-Australia offset, for example, the United States has committed itself to a combined United States industry and Department of Defense offset acquisition objective of 25% of the value of major (over \$500,000) Australian foreign military sales purchases from the United States. Under the United States-Switzerland offset arrangement, the acquisition objective is at least 30% of the value of Swiss orders for United States F-5E and F-5F aircraft.

¹⁰⁶ For example, under the offset arrangement between the United States and the participating European governments (Belgium, Denmark, the Netherlands and Norway), the item procured must be in support of the F-16 aircraft program to be eligible for a waiver.

quirements—to DOD procurement of defense equipment items.¹⁰⁷ These agreements are significantly broader than offset arrangements, since there is no fixed qualitative or quantitative objective which the foreign purchase must meet. A typical implementation of these agreements includes an issuance by the Office of the Secretary of Defense of a blanket waiver of Buy-American Act restrictions, balance of payment bid evaluation differentials, and import duties on all foreign produced items¹⁰⁸ procured by DOD agencies.¹⁰⁹ In essence, each party promises unrestricted access to the other's defense procurement market.

THE IMPACT OF THE PRE-AGREEMENT SALES ENVIRONMENT ON GOVERNMENT TELECOMMUNICATIONS PROCUREMENT

The Impact on Nondefense Procurement

Foreign nontariff barriers have effectively deterred export sales by United States suppliers. Indeed, the Japanese and European markets are virtually closed to United States telecommunications products.¹¹⁰ In developing markets, the requirement of local investment and the use of increasing amounts of local material and labor create an additional chilling effect on United States export sales.

The closure of a substantial portion of government-controlled foreign PTT markets to United States exports, coupled with the structure of the United States telecommunications equipment market—comprised mainly of nongovernment customers—has had a serious adverse impact on United States suppliers. The primary consequence is a direct barrier to foreign source income. The

¹⁰⁷ The impetus for the reciprocal procurement agreement is a desire to facilitate non-nuclear combat effectiveness of the military forces of North Atlantic Treaty Organization members by standardizing weapon systems, ammunition, fuel, and other military implements for land, air, and naval forces. Department of Defense Appropriation Authorization Act of 1975, Pub. L. No. 93-365, 88 Stat. 399.

¹⁰⁸ For example, surgeons' blades purchased by the Defense Personnel Supply Center would be eligible for the exemptions if the blades were made in a country with which the United States has such a reciprocal procurement agreement.

¹⁰⁹ See 41 U.S.C. §§ 10a-10d (1976); GAO Report, *supra* note 82, at 13.

¹¹⁰ It has been estimated that the Japanese telecommunications industry could open an additional \$3.3 billion to export competition. S. REP. No. 249, 96th Cong., 1st Sess. 1, 145, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 531. See generally CONGRESSIONAL BUDGET OFFICE, BACKGROUND PAPER: THE EFFECTS OF THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS ON THE U.S. ECONOMY: AN UPDATED VIEW 25 (1979); Are "They" in Trouble? (*Japanese Telecommunications*), Electronic News, Mar. 15, 1979, at 24, col. 1.

second, more subtle effect is the injury resulting from the inability of United States firms to reach or maintain economies of scale or to recoup the large research and development investments necessary to retain a competitive position in their own market. This additional impediment is largely due to the ability of foreign exporters to compete successfully in the large United States nongovernment market, while reaping high profit sales from a home market protected from price or import competition.¹¹¹ With respect to nondefense telecommunications purchases by the United States Government, however, the 6% Buy-American price preference has provided a meaningful edge over foreign competitors. This factor has been especially critical in preserving for American suppliers sales of central office and other switching equipment.

The Impact on Defense Procurement

Domestic sales of communications equipment to the United States Government for defense purposes are generally protected from foreign competition by the Buy-American Act and Department of Defense price preferences.¹¹² Likewise, foreign government preferences for their own defense communications equipment, when domestically available, are a significant impediment to United States export sales.¹¹³ The present tradeoff between export sales lost to foreign governments and protected domestic sales could be upset, however, by the Department of Defense with the addition of reciprocal memoranda of understanding.¹¹⁴

¹¹¹ The apparent advantage enjoyed by foreign firms was a key concern of the heavy electrical equipment industry, which supported passage of the Agreement to help eliminate the subsidization of low-priced imports with profits derived from high prices in protected home markets. See Pomeranz, *supra* note 24, at 1270.

¹¹² See notes 79-81 *supra*.

¹¹³ See notes 82 & 83 *supra*.

¹¹⁴ Under proposed changes to Defense Acquisition Regulations, Buy-American protection would no longer apply to purchases from allies supporting the NATO Rationalization, Standardization and Interquality program in an off-set memorandum. See Proposed Revision to Defense Acquisition Regulation, Part 14, "Purchases From Participating Countries," 785 Fed. Cont. Rep. (BNA) A-19 & D-1 (1979).

THE TELECOMMUNICATIONS BUSINESS UNDER THE AGREEMENT ON
GOVERNMENT PROCUREMENT—FACTORS TO CONSIDER IN A
CHANGED ENVIRONMENT

Considerations in the Nondefense Telecommunications Market

The effect of the Agreement on the United States nondefense telecommunications environment will initially depend upon the coverage which our trading partners will offer American suppliers in return for the broad coverage which the United States will grant.¹¹⁵ The willingness of our trading partners to offer government telecommunications purchases, with respect to offers of coverage to United States products, has been disappointing.¹¹⁶ Japan and the European Community, the principal foreign markets for United States telecommunications products, have withheld major purchases of large potential customers from the Act's purview.¹¹⁷ Moreover, many countries which are presently or potentially important telecommunications customers either are not parties to the Agreement, or have not offered their telecommunications entities for coverage. For example, Annex I lists no Mideast, Latin American, or African country as a signatory to the Agreement,¹¹⁸ except for Nigeria, which has conditionally offered its telecommunications purchases for coverage.¹¹⁹ Thus, absent bilateral agreements with the United States, the Agreement will have no effect on trade barriers which may exist in those countries.

In response to the disappointing offers from other parties, the United States has withheld from coverage the purchases of specified government agencies,¹²⁰ several of which are significant purchasers of telecommunications products.¹²¹ Given the small num-

¹¹⁵ See notes 116-22 *infra*.

¹¹⁶ Since the United States telecommunications market is essentially open, it was anticipated that the Agreement would provide little incentive to our trading partners to open up their procurement of telecommunications products to United States suppliers. H.R. REP. NO. 317, 96th Cong., 1st Sess. 105 (1979).

¹¹⁷ Although the European Community has excluded the telecommunications portions of their PTT's, this is not a total product exclusion. Certain central government agencies such as interior or justice ministries are covered by the Agreement. The exclusion of the PTT's was nonetheless disappointing. S. REP. NO. 249, 96th Cong., 1st Sess. 1, 143, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 529.

¹¹⁸ See Agreement on Government Procurement, *supra* note 11, Annex I.

¹¹⁹ *Id.*

¹²⁰ See S. REP. NO. 249, 96th Cong., 1st Sess. 1, 143, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 528.

¹²¹ The Automated Data and Telecommunications Service of the General Services Ad-

ber of entities offered for coverage by foreign parties, the effect of the Agreement on domestic telecommunications equipment companies that supply the United States Government may be varied. Where the Buy-American Act remains applicable—for example in purchases by government agencies withheld from coverage¹²²—the Agreement will not affect the nondefense telecommunications industry. Where, however, telecommunications equipment sales to United States government agencies are covered by the Agreement, the projected impact is uncertain. It is probable that domestic equipment suppliers are at least technologically equal to foreign suppliers. Thus, although a significant edge in pricing has been removed, United States producers should be in a position to remain competitive.

The impact of the Agreement on American telephone companies, operating with substantial overhead costs necessitated by their public service roles, is less optimistic. These companies lease and sell telecommunications equipment to government agencies in connection with their telephone services. Under the Agreement, the telephone companies must compete for United States Government business with foreign interconnect firms which will be able to bid not only without the burden of public utility overhead, but also without the barrier of the Buy-American Act. Additionally, the many hundreds of American telephone operating companies cannot benefit from the potential opening of foreign markets, since their sale or lease of equipment is only ancillary to their franchise obligations to provide local, domestic telephone services.

While the Agreement may cause an adverse competitive effect in the United States market, it appears to have provided little countervailing benefit in export markets.¹²³ Since most foreign countries operate their telephone systems through government owned or controlled entities, the deprivation to the United States telecommunications suppliers resulting from the withholding of purchases of those entities from the Agreement's coverage seems clear.¹²⁴ Even though Japan has offered to open a portion of its

ministration is a significant purchaser, yet it is not covered by the Agreement. Its 1980 allocation for telecommunications products and services totals approximately \$807 million. [1979] GSA ANNUAL REPORT 28.

¹²² See note 120 *supra*.

¹²³ See note 116 *supra*.

¹²⁴ It has been estimated that if the United States waived Buy-American protection for all covered products, it would open to the competitive marketplace approximately \$12.5 billion, while gaining access to approximately \$20 billion. See Statements of Administrative

telephone network, the offer falls short of the goals set by the United States Administration.¹²⁵ Similarly, the EEC has given notice that it will not consider opening the telecommunications purchases of its PTT's until 1981, thereby precluding United States companies access to the lucrative European business.¹²⁶

Moreover, although the Agreement provides a general framework for fair and open telecommunications procurement by foreign government entities which are or will be covered by it,¹²⁷ new foreign business opportunities may continue to be hampered by significant trade barriers which exist in some telecommunications markets. Illustrative of these barriers is the requirement for local presence in the form of an investment, a licensing arrangement, set-off procurement, or the use of local material and labor.¹²⁸ Although it is difficult to view such requirements as nondiscriminatory, the Agreement's provisions that deal with qualifying a supplier to participate in tendering procedures do not prohibit them.¹²⁹ In essence, the Agreement provides only that such re-

Action intended to implement the Trade Agreements Act of 1979, House Doc. No. 153, Part II 96th Cong., 1st Sess. 1388, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 665. The potential Japanese telecommunications equipment market itself has been estimated at over \$3 billion. See *Hearings on Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland Before the Subcommittee on Trade of the House Committee on Ways and Means*, 96th Cong., 1st Sess. 72 (1979) (Statement of Ambassador Alonzo L. McDonald).

¹²⁵ The Comptroller General, for example, noted that "the U.S. government initially hoped that the Japanese government would open a total of \$8 to \$10 billion and more recently, \$7.5 billion worth of procurement to bidding by foreign suppliers." *Comptroller General Report*, *supra* note 72, at 77 (footnotes omitted).

Recent discussions between Japan and the United States have not produced an acceptable telecommunications offer by Japan. The United States has rejected Japan's latest proposal for joint research and development projects for mainframe (switching) equipment, presumably preferring that United States firms bid for contracts only after completion of the research project. *ELECTRONIC NEWS*, Aug. 18, 1980, at 18, col. 1.

¹²⁶ The likelihood that the PTT's will open their purchases by 1981 seems remote. See note 117 *supra*. The American Electronics Association, in testimony before the Subcommittee on Trade of the House Ways and Means Committee, reported that the EC plan to integrate could "potentially result in barriers to U.S. exports." See *Hearings Before the Subcommittee on Trade of the House Ways and Means Committee*, 96th Cong., 2d Sess. (1979) (Statement of Victor Ragosine).

¹²⁷ See notes 4 & 9 *supra*.

¹²⁸ See note 82 *supra*.

¹²⁹ The Agreement suggests that an entity "should normally refrain from awarding contracts on the condition that the supplier provide off-set procurement opportunities or similar conditions." Agreement on Government Procurement, *supra* note 11, at art. V, para. 14 (h) (emphasis added). Notes to paragraph 14(h), however, allow developing countries to "require incorporation of domestic content, offset procurement, or transfer of technology as criteria for award of contracts." *Id.*, notes. Any such condition must, of course, be expressed

quirements be published in adequate time for a supplier to initiate, and, to the extent compatible with the efficient operation of the procurement process, complete the qualification and submit a responsive tender.¹³⁰ An entity that complies with the Agreement's publication requirements may therefore continue to favor local suppliers and thwart the Agreement's intended purpose.

Trade barriers erected by regional equipment standards remain a hinderance to American suppliers.¹³¹ Because such standards usually are based upon either the international standard or upon a recognized national standard, their use is not prohibited by the Agreement. The Agreement does, however, prohibit the application or creation of standards to promote obstacles to trade.¹³² Accordingly, a signatory party that believes standards are being so designed would have a proper complaint.¹³³

Given the inadequate telecommunications coverage granted under the Agreement by major industrial countries, a view of the methods by which the domestic telecommunications industry can be assured of a *quid pro quo* becomes crucial. One method, of course, rests with the Presidential authority to prohibit government procurement from countries which neither are parties to the Agreement nor provide appropriate reciprocal competitive opportunities to products of the United States or its suppliers.¹³⁴ Use of this method is particularly pertinent with respect to current entity negotiations with Japan.¹³⁵ Although the prohibition provisions address reciprocity in the general terms of "United States products," the Act does provide for the negotiation of industry-wide objec-

in the tender itself. See *id.* art. V, paras. 4 & 12(h).

¹³⁰ *Id.* at art. V, para. 2(a).

¹³¹ The Bell Standard is an American barrier to foreign imports. In the United States, however, where the government does not own the telecommunications system, it appears less likely that technical standards could be used systematically to avoid foreign competition.

¹³² Agreement on Government Procurement, *supra* note 11, art. IV, para. 1. The existence of regional standards in Europe has, to a major degree, thwarted attempts within the EC to create a community-wide telecommunications market. See 1 ADL *supra* note 70 at 24; note 75 *supra*.

¹³³ See notes 53-57 *supra*.

¹³⁴ 19 U.S.C. § 2514(b) (Supp. III 1979). The legislative history of the Act discusses this section in terms of an expectation that the President will continuously and vigorously seek to establish reciprocity in particular product sectors including telecommunications. See S. REP. NO. 249, 96th Cong., 1st Sess. 137, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 522-23.

¹³⁵ See note 125 *supra*.

tives¹³⁶ in the renegotiations scheduled to begin by January, 1984.¹³⁷ The legislative history of the Act clearly establishes that the telecommunications industry was intended to be included as a subject for these sector renegotiations.¹³⁸ Not only should the telecommunications industry monitor these negotiations to help protect its interests, but it should continue to inform the Executive Branch of the industry's loss resulting from the refusal of most developed countries to allow the Agreement to cover the telecommunications purchases of its PTT's. The President is required to report to Congress on such refusals on or before July 1, 1981.¹³⁹

In the entity negotiations with Japan, (the most important opportunity for increasing industry protection), in negotiations with potential new parties, and in renegotiations with present parties, it is critical that the United States emphasize both the quality and quantity of telecommunications opportunities offered by foreign entities.¹⁴⁰ Access to tenders at the research and development stage is of vital importance with respect to high cost central office switching systems and transmission equipment purchases in Europe. Access to primary stage development contracts would allow future bids on equipment built to a standard which United States suppliers subsequently could include in their product planning.¹⁴¹ The importance of early participation is emphasized by the Agreement itself, which allows single tendering by an original supplier for equipment replacements or for extensions when a change of supplier would compel the purchase of equipment which is not interchangeable with existing equipment.¹⁴² The Agreement further stresses the importance of ground-floor participation by allowing an entity to use single tendering to purchase prototypes and first

¹³⁶ 19 U.S.C. § 2514(a) (Supp. III 1979); Agreement on Government Procurement, *supra* note 11, art. V, para. 15(d).

¹³⁷ The Act provides that if the President determines that expansion in the coverage granted by entities of developed countries, which are principal purchasers on appropriate product sectors, is not likely to occur within 12 months from the start of the renegotiations, he shall report that determination to Congress together with "appropriate actions to seek reciprocity in such product sectors . . ." 19 U.S.C. § 2514(d)(1) (Supp. III 1979).

¹³⁸ S. REP. No. 249, 96th Cong., 1st Sess. 137, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 381, 523.

¹³⁹ 19 U.S.C. § 2515(c) (Supp. III 1979).

¹⁴⁰ The Act requires that the United States be given "appropriate reciprocal competitive government procurement opportunities." 19 U.S.C. § 2512(a) (Supp. III 1979). Presumably, this standard includes both quality and quantity.

¹⁴¹ Agreement on Government Procurement, *supra* note 11, art. V, para. 15(e).

¹⁴² *Id.* (d).

products developed at its request in the course of a particular contract for research or development.¹⁴³

Finally, sales of low-cost volume items to foreign governments could be profitable for United States suppliers. Since foreign PABX, interconnect, and subscriber products already compete in the United States, United States products should be afforded the reciprocal opportunity to compete for foreign PTT business.

Considerations in the Defense Telecommunications Industry

The Department of Defense is the largest customer for defense telecommunications.¹⁴⁴ Since most of the telecommunications purchases of the DOD come within the national security exclusion, the Agreement should not have an adverse impact on the defense communications industry.¹⁴⁵ While Annex I lists certain telecommunications products as not "generally" covered due to the national security exclusion,¹⁴⁶ however, the use of "generally" could be interpreted to give *ad hoc* leeway to contract officers to limit the list of excluded items. Such an interpretation should be made only when the public interest is clearly served. Private sector monitoring is the primary method of assuring that the United States maintains its own strong, secure defense telecommunications system.¹⁴⁷

The growing utilization of reciprocal memoranda of understanding may also play an important role in the future. Although memoranda are negotiated outside the Agreement, it clearly recognizes their existence.¹⁴⁸ By allowing the President to authorize the

¹⁴³ Agreement on Government Procurement, *supra* note 11, art. V, para. 15(e).

¹⁴⁴ See note 99 and accompanying text *supra*.

¹⁴⁵ The Industry Sector Advisory Committee encompassing communications equipment (ISAC #22) stated in the conclusion of its report to the Senate Finance Committee on the Agreement:

This ISAC recognizes a legitimate concern on the part of all countries that they maintain a strong internal telecommunications design and manufacturing capability. Therefore, we endorse and strongly support the exclusion of departments of defense telecommunications from the Government Procurement Code on the grounds of national security of the signatories to the treaty, and recommend that all telecommunications systems, equipment and components be excluded from coverage of the Code except upon the basis of bilateral negotiations.

SENATE FINANCE COMMITTEE, PRIVATE ADVISORY COMMITTEE REPORTS ON THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 449, 458 (Committee Print 1979).

¹⁴⁶ Agreement on Government Procurement, *supra* note 11, Annex I.

¹⁴⁷ *Id.* art. V, para. 16.

¹⁴⁸ 19 U.S.C. § 2512(b)(3) (Supp. 1979).

Secretary of Defense to waive a purchasing prohibition in favor of any country which enters into a reciprocal purchasing agreement with the DOD,¹⁴⁹ the Act seemingly supports the memoranda effort of the Department and emphasizes the need for the defense communications equipment sector to monitor this process.

CONCLUSION

The Agreement on Government Procurement could provide many United States suppliers with a net gain in customers and profits, since the vast United States nongovernment telecommunications equipment market is already open to foreign suppliers, while major export markets could offer lucrative long-term opportunities. The degree of benefit to be derived by the telecommunications industry, however, will depend upon skillful negotiations with Japan (which could continue until the Act's January 1, 1981 effective date) and upon renegotiations with the European Community. Also, the effectiveness must be preserved through the judicious use of designations of eligibility, and resolute application of the prohibition to induce reciprocity and to encourage additional countries to become parties to the Agreement. In the defense market, furthermore, industry members must monitor Department of Defense memoranda¹⁵⁰ and other reciprocal purchase arrangements, to guarantee that more defense telecommunications work is not given away than taken in. Most importantly, Congress, the Department of Commerce, and the United States Trade Representative must continue their vigil to ensure that trade liberalization does not become a mere catchphrase, and that a domestic industry, such as telecommunications equipment, is not threatened by the offering of a procurement opportunity without reciprocation by our trading partners.

¹⁴⁹ *Id.*

¹⁵⁰ See *Hearings on the Multilateral Trade Negotiations Concluded in Geneva, Switzerland Before The Government Affairs Committee of the United States Senate*, 96th Cong., 1st Sess. 56, 68 (1979) (Statement of J. H. Lasley, Chairman of ISAC-22). The private sector has stressed the importance of monitoring the MOU process to help assure that United States suppliers receive reciprocity for prime contract offsets. Such monitoring is especially important given the potpourri of subcontracts that may be setoff for United States allies under NATO programs and for which Buy-American protection may be waived.